80-1699 NO.

Office-Supreme Court, U.S.
FILED
APR 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR. MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JAMES R. ZAZZALI,
Attorney General of New Jersey,
Attorney for Petitioners,
State House Annex,
Trenton, New Jersey 08625.
(609) 292-8231

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel.

STEVEN WALLACH,
Deputy Attorney General,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented

1. Did the court of appeals err in creating a constitutional right to treatment in the least restrictive setting for the criminally insane in a case where the plaintiff was currently receiving adequate treatment and his own expert witness testified that he found no evidence of malpractice or any indifference to plaintiff's medical needs and where plaintiff had consistently refused various important forms of psychiatric treatment offered to him?

2. Did the court of appeals err in ordering specific injunctive relief, irrespective of fiscal or budgetary limitations, when plaintiff was currently receiving adequate care and when the relief requested includes the construction of a new Forensic Unit at a cost of several million dollars?

3. Do this Court's decisions in *O'Connor* v. *Donaldson*, *Wood* v. *Strickland* and *Procunier* v. *Navarette*, establishing a qualified good faith immunity for state administrative officials, preclude the awarding of monetary damages when none of the defendants had any personal responsibility for plaintiff's care and did not participate personally or directly in any alleged violation of his constitutional rights and when the rights allegedly violated were not even created until the trial in this case?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT—The court of appeals' creation in this case of a constitutional right to treatment in the least restrictive setting for the criminally insane and its rejection of the good faith immunity for state administrative officials who had no direct involvement in the alleged violation of plaintiff's rights has no basis in the decisions of this Court and is in conflict with lower federal court decisions and thus should be reviewed by this Court because these highly controversial legal conclusions will have an extremely detrimental effect on the operation of public mental health facilities throughout the United States	9
A—Certiorari should be granted to resolve the significant question expressly left open in *O'Connor* v. *Donaldson* as to whether the dangerous mentally ill have a constitutional right to treatment	12
B—Certiorari should be granted because the court below has misinterpreted, and for all practical purposes eliminated, the qualified good faith immunity of state administrative officials set forth in *O'Connor* v. *Donaldson* and *Wood* v. *Strickland*	16
CONCLUSION	22

PAGE

APPENDIX:

A—Opinion of the United States Court of Appeals for the Third Circuit of February 5, 1981 ..... 1a

B—Opinion of the United States District Court for the District of New Jersey of January 8, 1980 ..... 49a

C—Order and Statement of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing of March 6, 1981 ..... 62a

D—Order of the United States Court of Appeals for the Third Circuit, Granting Stay of the Mandate of March 6, 1981 ..... 64a

Cases Cited

Alabama v. Pugh, 438 U.S. 781 (1978) 20

Alcaro v. Jean Jordeau, Inc., 138 F.2d 767 (3d Cir. 1943) 16

Allen v. McCurry, 449 U.S. ——, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980) 15

Bell v. Wolfish, 441 U.S. 520 (1979) 17

Coggins v. McQueen, 447 F.Supp. 930 (E.D. Pa. 1978) 17, 18

Donaldson v. Hovanec, 473 F.Supp. 602 (E.D. Pa. 1979) 17, 18

Edelman v. Jordan, 415 U.S. 651 (1974) 20

Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976) 17, 18

PAGE

In the Matter of Thomas Selefo, Jr., 170 N.J. Super. 394, 406 A.2d 973 (App. Div. 1979) 3

Morales v. Turman, 562 F.2d 993 (5th Cir. 1977) 12, 13

Nelson v. Reese, 598 F.2d 822 (3rd Cir. 1979) 17, 19

O'Connor v. Donaldson, 422 U.S. 563 (1975) ....i, 9, 10, 12, 13, 16, 17, 19

Patton v. Dumpson, 425 F.Supp. 621 (S.D. N.Y. 1977) 13

Procunier v. Navarette, 434 U.S. 555 (1978) .....i, 9, 17, 19

Quern v. Jordan, 440 U.S. 332 (1979) 20

Romeo v. Youngberg, No. 78-1982 (3d Cir. November 25, 1980) 8, 11-13

Rone v. Fireman, 473 F.Supp. 92 (N.D. Ohio 1979) 13

Scott v. Plante, 532 F.2d 939 (3d Cir. 1976) 12

Skehan v. Bd. of Trustees of Bloomsburg State College, 590 F.2d 470 (3d Cir. 1978) 20

State v. Fields, 77 N.J. 282, 398 A.2d 574 (1978) 3

State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) 3

Stilwell v. Hertz Drivurself Stations, 174 F.2d 714 (3d Cir. 1949) 16

Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) 10

Woe v. Mathews, 408 F.Supp. 419 (E.D. N.Y. 1976) 13

Wood v. Strickland, 420 U.S. 308 (1975) .....i, 9, 16, 17, 19

United States Constitution Cited

Eleventh Amendment 20

Fourteenth Amendment 17

PAGE

Statutes Cited

28 U.S.C. §1254(1) 2
42 U.S.C. §1983 ..... 3, 17

Rules Cited

Fed.R.App.P.:
41(b) 8
Fed.R.Civ.P.:
50 6
59 6

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DR. INGRE RUDOLPH PLANTE; Commissioner of Institutions and Agencies, ANN KLEIN; Medical Director of New Jersey State Hospital, New Jersey Mental Health Commissioner, DR.MARTIN WEINBERG; STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor; SUPREME COURT OF NEW JERSEY, RICHARD J. HUGHES, Chief Justice,

Petitioners,

vs.

ALLEN BODINE SCOTT, by and through his Guardian, Michael J. Weintraub,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 5, 1981.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, not yet reported, is included in this petition as Appendix A. The unreported opinion of the United States District Court appears in this petition as Appendix B. The order and statement of the United States Court of Appeals for the Third Circuit, denying petition for rehearing, is included in this petition as Appendix C. The order of the United States Court of Appeals for the Third Circuit, granting stay of the mandate, is included in this petition as Appendix D.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 5, 1981. A timely petition for rehearing was denied on March 6, 1981 and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals by issuance of a writ of certiorari.

Statement of the Case

Plaintiff Scott has been confined in the Forensic Unit of Trenton Psychiatric Hospital since 1955, following his indictment for murder and a finding that he was mentally incompetent to stand trial. (Exhibit D-6). Since that time he has had a plethora of hearings held before a State court judge concerning his mental condition, at which he was always represented by an attorney, and each hearing has resulted in a finding that he is still mentally

ill and dangerous. (Exhibits D-1, D-3, D-6; I T112-20 to I T114-11).* His most recent hearing, held on June 11, 1980 and July 2, 1980 and including testimony by two psychiatrists, resulted in a judicial determination that he was still "a danger to himself and to others by reason of his mental illness, schizophrenia, paranoid type," and his confinement at the Forensic Unit was continued "until further order of this Court." Pursuant to *State* v. *Fields,* 77 N.J. 282, 398 A.2d 574 (1978), and *State* v. *Krol,* 68 N.J. 236, 344 A.2d 289 (1975), he will receive an annual hearing in State court at which the State must show that he is still so dangerous by reason of his mental illness that he remains in need of confinement in the Forensic Unit. And, the State must prove these facts by clear and convincing evidence. *In the Matter of Thomas Sclefo, Jr.,* 170 N.J. Super. 394, 406 A.2d 973 (App. Div. 1979).

In this case, plaintiff seeks monetary, declaratory, injunctive and *habeas corpus* relief pursuant to 42 U.S.C. §1983 against various State administrative officials for unconstitutional conditions and inadequate psychiatric and medical treatment during his judicially ordered commitment to the Forensic Unit, as well as for defendants' failure to release him from confinement. The defendants

---

* The six transcripts for the five days of trial will be identified as follows:

I May 31, 1979
II June 1, 1979
III June 6, 1979
IV June 7, 1979
V June 13, 1979 (summations and charge to jury)
VI June 13, 1979 (verdict of jury)

Thus, for example, IT112-20 refers to the transcript for May 31, 1979, at page 112, line 20.

originally were the State of New Jersey, Governor Brendan T. Byrne, the Supreme Court of New Jersey, former Chief Justice Richard J. Hughes, Ann Klein, Commissioner of the New Jersey Department of Human Services, and two former Chief Executive Officers and Medical Directors of Trenton Psychiatric Hospital, Dr. Inge R. Plante and Dr. Martin Weinberg. Plaintiff's claims for monetary damages were tried before a jury over five days. Testimony was presented by plaintiff, plaintiff's expert witness Dr. Robert Sadoff, a psychiatrist, and defendants' expert witness Dr. Harvey Musikoff, a forensic psychologist who had been Chief of the Forensic Unit. In addition, Scott's complete medical records were introduced into evidence.

Scott's original diagnosis when first admitted to the Forensic Unit was schizophrenia with paranoid features and he still suffers from that mental illness. (II T7-21 to 24). Plaintiff's expert witness, Dr. Sadoff, testified that Scott was still actively delusional and had hallucinations and that it would be very difficult to predict his behavor. (II T7-23 to II T8-10). Dr. Musikoff, defendants' expert witness who had been part of Scott's treatment team, testified that he agreed with the diagnosis of schizophrenia with paranoid features. (III T107-22 to 25). He stated that he felt that Scott was "very dangerous" and that because of Scott's dangerousness and delusional thinking he should remain in the Forensic Unit, since the structure of the unit and its security procedures keep him from acting out violently. (III T108-4 to 5, III T109-24 to III T110-14).

With regard to the care and treatment provided Scott while at the Forensic Unit, Dr. Sadoff testified that he found no evidence of malpractice or any indifference to his medical needs or any evidence that the defendants

had harmed him. (II T22-8 to 16, II T23-12 to 15). He also stated that Scott's treatment was typical of persons suffering from a similar mental illness, at a similar point in time, in a state institution for the criminally insane like the Forensic Unit. (II T22-17 to 22). Dr. Musikoff testified that, since Scott's commitment in 1955, there had been an adequate attempt to treat him for his mental illness. (III T114-12 to 16).

Dr. Sadoff testified that Scott had refused various important forms of psychiatric treatment including group therapy and medication and that as long as he continued to do so there was little that can be done for him. (II T23-1 to II T24-16). Dr. Musikoff reported that Scott participated in his treatment program only in "a very, very minimal way." (III T53-10 to 15). He stated that, as a result of this refusal to participate in treatment, prospects for improvement of Scott's mental condition were "nil." (III T57-24 to III T58-9). He pointed out that if Scott had not refused to participate in treatment programs he would have had more opportunities to work with the members of the treatment team, both individually and as a group. (IV T23-20 to IV T24-14). Plaintiff himself admitted that he had refused various major forms of treatment including group therapy, occupational therapy, and psychotropic medication, as well as psychological testing. (I T79-12 to I T80-7, I T103-20 to I T104-13, I T90-15 to 22, I T119-1 to 10).

With regard to his treatment and care at the Forensic Unit, Scott testified that he has a treatment team which includes a teacher, social worker, psychologist, several nurses, and other staff and that the treatment team began working with him two or three years ago and now is scheduled to meet on a weekly basis. (I T125-25 to I T126-15, I T133-13 to 22). He also reported that he had access

to various forms of medical care in the Forensic Unit and has not suffered from any major medical problems during his confinement at the Forensic Unit, nor has he ever been harmed during his stay there. (I T65-2 to I T71-25, I T132-16 to I T133-2).

Prior to submitting the case to the jury the district court dismissed defendants State of New Jersey, Governor Byrne, Supreme Court of New Jersey, and Chief Justice Hughes. (Aa50). The Court also dismissed all of plaintiff's State law claims, which included false imprisonment, assault and battery, and malpractice. (Aa50). The case was submitted to the jury on three issues, constitutional right to treatment, constitutional right to refuse treatment*, and constitutional right to adequate living conditions, and the jury returned a verdict for the plaintiff on his claims of deprivation of adequate treatment and physical conditions violative of due process. (Aa50-51). The jury awarded $15,000 compensatory damages and $10,000 punitive damages jointly against defendants Klein, Weinberg and Plante. (Aa51). The jury found for defendants on plaintiff's claim that he was forced to undergo treatment against his will. (Aa50-51). The district court reserved judgment on the requests for injunctive relief not presented to the jury.

Defendants then moved pursuant to Fed.R.Civ.P. 50 and 59 for judgment notwithstanding the verdict, or in the alternative for a new trial. On January 8, 1980 the district court issued its decision vacating the punitive damages award, reducing the compensatory damages award to the nominal sum of $1, denying plaintiff's petition for *habeas corpus* and for alternative forms of injunctive relief, and denying defendants' motion for a new trial. In granting

---

* Plaintiff has not appealed from the adverse jury verdict on this issue. (Aa16).

judgment notwithstanding the verdict, the district court concluded that "an award of punitive damages in the instant case is totally without evidentiary basis" and thus vacated that portion of the jury verdict. (Aa53-54). With respect to compensatory damages, the court observed that plaintiff suffered no real compensable injury and that there was no justification to hold defendants Klein, Weinberg or Plante liable for money damages. (Aa57). On these bases, it reduced the compensatory damages award to "nominal damages of $1" and thus did not address the question of when any right to treatment was constitutionally recognized. (Aa57-58).

The district court denied plaintiff's petition for *habeas corpus,* based upon the numerous hearings which have recommended his continued confinement and the absence of testimony which would justify his release. (Aa58-59). Plaintiff's request for various forms of injunctive relief, including the erection of a new facility, establishment of a law library and amendment of the rules of the New Jersey Supreme Court, were each denied. (Aa59-60). The district court concluded that the circumstances and facts of this case did not "warrant its interference with either the legislative or judicial branches of the government of the State of New Jersey." (Aa60).

Both sides appealed from the district court's decision and oral argument was heard before the court of appeals on September 18, 1980. On February 5, 1981 the court of appeals issued a 41-page opinion, vacating the district court's decision, ordering a new trial on the damages claims and ordering the district court to fashion "an appropriate decree" providing Scott with "specific relief from its [the Forensic Unit's] intolerable conditions." (Aa32). In reaching its decision the court of appeals created a constitutional right to treatment in the least restrictive set-

ing for the criminally insane, as well as the mentally ill, and refused to accept the district court's finding that, under the facts of this case, this Court's decisions setting forth a limited good faith immunity for state administrative officials precluded the awarding of non-nominal damages against the defendants. The court of appeals also ordered the district court to conduct a hearing on whether plaintiff could be transferred out of the Forensic Unit, despite an adverse decision on that very issue by a State court in July 1980.*

Defendants moved for rehearing and on March 6, 1981 that request was denied by a four-three vote. (Aa62-63). Three judges joined in a Statement Sur Petition written by Judge Adams (the author of the court's *en banc* opinion in Romeo) that:

> "Whether the standards developed in *Romeo* v. *Youngberg*, No. 78-1982 (3d Cir. Nov. 25, 1980) (en banc) for the involuntarily committed mentally retarded should be applied across-the-board to the involuntarily committed mentally ill who have been incarcerated following a finding of not guilty by reason of insanity, as well as what the exact contours of official immunity and the 'good faith' defense should be in this context are important questions which I believe merit the attention of the full court."

Defendants moved pursuant to Fed.R.App.P. 41(b) for a stay of the mandate pending submission of this application for certiorari. On March 16, 1981 the court of appeals granted the motion, staying the mandate until April 12, 1981. (Aa64).

---

* That decision has been appealed by plaintiff to the Superior Court of New Jersey, Appellate Division.

Reasons for Granting the Writ

The court of appeals' creation in this case of a constitutional right to treatment in the least restrictive setting for the criminally insane and its rejection of the good faith immunity for state administrative officials who had no direct involvement in the alleged violation of plaintiff's rights has no basis in the decisions of this Court and is in conflict with lower federal court decisions and thus should be reviewed by this Court because these highly controversial legal conclusions will have an extremely detrimental effect on the operation of public mental health facilities throughout the United States.

In this case the court of appeals has created constitutional rights for the criminally insane and, for all practical purposes, eliminated the qualified good faith immunity of state administrative officials. The court of appeals' overruling of the district court's holding that the facts and law governing this case prevented the awarding of nonnominal damages against the defendants totally ignores this Court's decisions in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975); *Wood* v. *Strickland,* 420 U.S. 308, 322 (1975); and *Procunier* v. *Navarette,* 434 U.S. 555 (1978). In establishing a constitutional right to treatment for the dangerous mentally ill, it has decided the issue left open by this Court in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 573 (1975), and ignored the concurring opinion of the Chief Justice in that case, as well as several lower federal court decisions which raise serious questions concerning the viability of such a right.

The Third Circuit's creation of a constitutional right to treatment for the mentally ill and criminally insane ignores the substantial legal, clinical and fiscal barriers to the judicial enforcement of such a right. The legal basis for any constitutional right to treatment, based upon a *quid pro quo* theory, has been questioned by the Chief Justice in *O'Connor* v. *Donaldson*, and by several lower federal courts, including the court of appeals which created the right. The difficulties in evaluating any right to treatment are legion and several federal courts have raised serious questions as to whether the courts are capable of delving into such matters. Perhaps most importantly, the appellate court has indicated that the constitutional right to treatment could require the state to build an entire new facility to satisfy one patient's claims and has stated that fiscal constraints are not to be considered. If these assertions are correct, then the court's establishment of this right will have a disastrous effect on state budgets and could cause a state to consider discharging all the dangerous mentally ill in order to avoid the type of relief suggested by the Third Circuit in this case. See *Welsch* v. *Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977). There are presently several thousand patients residing in public psychiatric hospitals in New Jersey who are both mentally ill and dangerous and the potential ramifications of the Third Circuit's sweeping analysis are practically unlimited, especially in light of their suggestion that the right to treatment could require the State to build a new facility. Before a confrontation between the federal judiciary and the states is reached in this area, or the states adopt the drastic remedy of closing all their facilities for the mentally ill and criminally insane, the panel's far reaching and novel conclusion should be considered by this Court.

The court of appeals' rejection of the qualified good faith immunity will have similarly devastating effects on

the operation of the State mental health system. If this decision is left unchanged any public official involved in any way in administering, supervising or delivering public health care or social services is subject to liability for compensatory and punitive damages solely because of the failure of a state legislature to fully fund public health care and social service programs and facilities.* The decision in this case, coupled with the court of appeals' decision in *Romeo* v. *Youngberg,* will make it virtually impossible for a state to attract qualified professionals to fulfill administrative positions.

Because the issues in this case are of exceptional public policy importance**, and because the Third Circuit has ignored or misapplied established caselaw governing these issues, this Court should review the highly controversial and unsupported conclusions of the court of appeals in this case.

---

* For example, Commissioner Klein is responsible for administering an umbrella human services agency which delivers services to 12,000 persons in institutions for the mentally ill or mentally retarded. Under the standards articulated in this case and *Romeo,* she is potentially liable to each of these clients for compensatory and/or punitive damages solely because of the Legislature's failure to adequately fund her Department.

** Circuit Judge Adams (who wrote the court of appeals' *en banc* opinion in *Romeo* v. *Youngberg, supra*) filed a statement dissenting from the court of appeals' denial of defendants' petition for rehearing in this case, joined in by two other circuit judges, which argued that the issues raised "are important questions which I believe merit the attention of the full court." (Aa63).

A. Certiorari should be granted to resolve the significant question expressly left open in *O'Connor* v. *Donaldson* as to whether the dangerous mentally ill have a constitutional right to treatment.

The panel decision in this case created a constitutional right to treatment for the mentally ill, and then applied it to the criminally insane such as plaintiff, simply by asserting that "[i]n *Romeo* v. *Youngberg*, No. 78-1982 (3d Cir. November 25, 1980) (en banc) we held that the involuntarily committed mentally retarded have a constitutionally protected right to treatment, and the analysis of that case is for Fourteenth Amendment purposes equally applicable to the involuntarily committed mentally ill. *Id.*, Slip op. at 32 n.53." (Aa16-17). This leap in legal reasoning was made despite that court's statement in *Romeo** that "[i]t is important to remember, however, that insofar as a constitutional right to treatment is concerned, there are critical differences between the mentally ill and the mentally retarded. Cf. *Kremens* v. *Bartley*, 431 U.S. 119, 135-36 (1977)." (Slip op. at p. 48). Such a significant legal conclusion, even if correct, should not be reached by a single panel of the court of appeals but should be decided by this Court.

No additional case law support was provided for this farreaching result, which was specifically not reached by this Court in *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573 (1975) nor by the Third Circuit in *Scott* v. *Plante*, 532 F.2d 939, 947 (3d Cir. 1976). Since that time, no decision by this Court has addressed that issue, and the same court of appeals which created this right has also expressed serious doubts concerning its existence. *Morales* v. *Turman*, 562 F.2d 993, 998 (5th Cir. 1977). In fact, one federal

---

* A petition for certiorari has been filed by the defendants in that case. U.S.S.Ct. No. 80-1429 (filed February 23, 1981).

district court has concluded that "the failure to properly treat one single person does not allege a violation of the constitutional right to treatment." *Patton* v. *Dumpson*, 425 F.Supp. 621, 624 (S.D.N.Y. 1977).

In establishing a constitutional right to treatment, the Third Circuit has ignored the substantial legal, clinical and fiscal barriers to the establishment and implementation of such a right. The Chief Justice, in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 587-8, and several lower federal courts have expressed serious doubts as to the *quid pro quo* rationale for a right to treatment. See *Rone* v. *Fireman*, 473 F.Supp. 92, 119 (N.D. Oh. 1979). Another federal court has pointed out that "[t]he difficulties are legion in assessing a 'right to treatment' from defining mentally ill, adequacy or treatment itself, to determining whether treatment is necessary or helpful or the condition is incurable, and to setting standards of care." *Woe* v. *Mathews*, 408 F.Supp. 419, 429 n.23 (E.D. N.Y. 1976). And, the court of appeals which created the constitutional right to treatment has more recently observed that "[t]o attempt to specify the type of treatment that should be provided may well be beyond the competence of federal judges." *Morales* v. *Turman*, 562 F.2d 993, 998 (5th Cir. 1977).

Perhaps the most critical error of the Third Circuit in creating this right was its assertion that budgetary constraints or insufficient funding should not be considered in fashioning a remedy to implement plaintiff's right to treatment. This approach is in direct conflict with that circuit's *en banc* holding in *Romeo* v. *Youngberg, supra,* that in evaluating a treatment program "[t]he state should be permitted to adduce evidence of security concerns, administrative necessities and *fiscal constraints* in the course of explaining its adoption of the challenged program." Slip op. at pp. 33-4 (emphasis added). Further-

more, the appellate court's sweeping approach to this complex issue ignores the hard fact of life that the State fisc must be shared with a large number of competing needs (such as welfare and health care for the poor, education for handicapped children, care and treatment for the 8,000 mentally retarded and developmentally disabled in State institutions, and treatment for the 4,000 civilly committed patients in State psychiatric facilities). Despite these considerations the Third Circuit has ordered the district court to implement plaintiff's right to treatment regardless of cost, and suggested that relief such as the construction of a new Forensic Unit at a cost of millions of dollars be considered. The court has ignored the dangers of judicial intrusion into this area, which has traditionally been left to the states, and not only created constitutional rights never recognized by this court but extended them to the criminally insane. Such a result was particularly inappropriate in this case, given the substantial evidence in the record that plaintiff's current treatment was adequate and where plaintiff has consistently refused most major forms of treatment, with his own expert testifying that there was little that could be done for him as long as he continued to refuse.

Furthermore, even assuming *arguendo* that the court of appeals was correct in holding that Scott has a constitutional right to treatment in the least restrictive setting, the steps which it ordered the district court to take to protect that right raise serious questions under principles of *res judicata*, abstention and comity between the federal and state judiciaries. Specifically, the court ordered that another hearing should be conducted on the question of whether Scott should continue to be confined in the Forensic Unit or transferred to another hospital within the State mental health system. This dis-

position failed to take proper account of the fact that Scott is confined at the Forensic Unit pursuant to an order of the State courts, not administrative action of the defendants, and that the State courts conduct annual periodic reviews to determine whether such placement continues to be appropriate. In Scott's case, the most recent such periodic review was conducted in June and July 1980. This consisted of a two-day hearing before a State court judge which resulted in a determination that Scott was still so dangerous that he should not be either released or transferred to another psychiatric facility. Furthermore, there was a right of appeal within the State appellate system from this order. Plaintiff has so appealed but no decision has yet been rendered by the appellate court. The practical effect of this part of the court of appeals' decision is to circumvent the State judicial process and instead to direct the district court to readjudicate precisely the same issue as was recently decided by the State courts. See *Allen* v. *McCurry*, 449 U.S. ——, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980).

In sum, the Third Circuit has created a constitutional right to treatment for the dangerous mentally ill despite extensive caselaw raising serious questions about both the legal basis of such a right and the ability of the judiciary to effectively involve itself in such issues. This novel legal conclusion was reached despite its tremendous fiscal ramifications and despite the fact that the district court concluded that plaintiff's current treatment was adequate. The Third Circuit's failure to heed the warning of other federal courts on this issue and its creation of a constitutional right despite clear evidence that the issue should not be reached in this case should be reviewed by this Court.

B. Certiorari should be granted because the court below has misinterpreted, and for all practical purposes eliminated, the qualified good faith immunity of state administrative officials set forth in *O'Connor* v. *Donaldson* and *Wood* v. *Strickland*.

The panel's decision in this case ignores the qualified good faith immunity of state mental health officials set forth by this Court in *O'Connor* v. *Donaldson, supra,* 422 U.S. at 577.* The test for immunity is that damages cannot be awarded unless the defendant "knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [plaintiff] . . . For purposes of this question, an official has, of course, no duty to anticipate constitutional develop-

---

* The court of appeals seeks to avoid deciding the important legal issues posed by this case, such as the scope of any constitutional right to treatment or the applicability of the qualified good faith defense of state administrative officials to the facts of this case, by asserting that defendants did not object to a particular instruction nor submit any instructions which were inconsistent with the instruction given. (Aa15-24). However, this statement is totally inaccurate. Not only did defendants submit instructions which were in conflict to and inconsistent with the instruction given by the district court on each of the issues discussed by the panel, but, furthermore, at the close of its instructions to the jury the district court stated that "[a]ll those requests to charge which I have not Charged, or changed and put into my own words, I refuse to Charge, so that will make your record on your request." This ruling by the court was sufficient to preserve defendants' right to appeal the district court's failure to adopt any of their proposed instructions. *Stilwell* v. *Hertz Drivurself Stations,* 174 F.2d 714, 715 (3d Cir. 1949). *Alcaro* v. *Jean Jordeau, Inc.,* 138 F.2d 767, 771 (3d Cir. 1943).

ments." *Id.* at 577. Despite the fact that the Third Circuit established a constitutional right to treatment for the criminally insane for the first time in this case and the only other case so holding was a federal district court in 1979, and despite the fact that this Court has never held that the mentally ill, much less the criminally insane, have a constitutional right to treatment, the appellate court refused to accept the district court's conclusion that the defendants were entitled to the good faith immunity set forth in *O'Connor* v. *Donaldson.* This result is in direct contravention of that court's decision in *Nelson* v. *Reese,* 598 F.2d 822 (3rd Cir. 1979) and decisions by this Court in *Procunier* v. *Navarette, supra, Wood* v. *Strickland, supra,* 420 U.S. at 322, and *O'Connor* v. *Donaldson, supra,* which hold that a state official cannot be found to have acted in disregard of constitutional rights if, at the time in question, there was no binding authority which established the asserted constitutional right. A similar analysis applies to the conditions claim, where the district court applied the Fourteenth Amendment standard of *Bell* v. *Wolfish,* 441 U.S. 520 (1979), to confinement of the criminally insane. The district court's ruling was the first time the Fourteenth Amendment standard has been applied to the criminally insane to evaluate their conditions of confinement and therefore damages could not have been awarded for defendants' failure to meet a standard which was only established in this case.

Furthermore, it has been clearly established that a supervisory official, such as each of these defendants, is only liable under 42 U.S.C. §1983 "if he is personally involved in the alleged wrongdoing." *Donaldson* v. *Hovanec,* 473 F.Supp. 602, 608 (E.D. Pa. 1979) (citations omitted). See also *Hampton* v. *Holmesburg Prison Officials,* 546 F.2d 1077, 1082 (3d Cir. 1976); *Coggins* v. *McQueen,* 447 F.Supp. 960, 966-7 (E.D. Pa. 1978). In this case plaintiff has sued

two former Chief Executive Officers and Medical Directors of Trenton Psychiatric Hospital, and the Commissioner of the Department of Human Services. He has not named as a defendant his treating psychiatrist, any of the members of his treatment team, or even the head of the Forensic Unit. Since plaintiff has not presented any evidence* that the three named defendants had any personal or direct responsibility for his care and treatment or participated personally or directly in the alleged violations of his constitutional rights, they should have been dismissed as defendants. *Donaldson* v. *Hovanec, supra; Hampton* v. *Homesburg Prison Officials, supra; Coggins* v. *McQueen, supra.* The failure to dismiss these three defendants constitutes a mistake of law which should be reversed by this Court and judgment entered on behalf of defendants on all money damages claims.

---

* Plaintiff's assertion that defendants had "both constructive and personal knowledge" of the alleged violations of his constitutional rights is unsupported in the trial record. In fact, the only contact between plaintiff and defendants Klein, Weinberg and Plante consisted of: several letters which dealt solely with plaintiff's refusal to take medication, a letter to Dr. Plante requesting that Dr. Elizondo be taken off his case, a letter to Commissioner Klein complaining that his mail was being searched, and a letter to Dr. Weinberg complaining of smoke in the day room and requesting his release. Each of those inquiries, written by Scott or his mother, was promptly answered by the hospital or departmental staff. Exhibits D-1, D-3.

Furthermore, none of these defendants had any direct responsibility for the care and treatment of plaintiff at the Forensic Unit, nor did any of them ever even work on that unit. (IIIT74-7 to 9; IIIT75-10 to 12). Scott himself testified that he had never met Commissioner Klein. (IT121-10 to 12). He also stated that he never met Dr. Plante or Dr. Weinberg and that neither of them ever worked directly with him in terms of his treatment program. (IT121-22 to IT122-20).

Since defendants have not taken any action within the scope of their official responsibility to violate his constitutional rights, they cannot be held liable for damages unless a malicious intent to injure plaintiff is shown. *O'Connor* v. *Donaldson, supra,* 422 U.S. at 577. *Nelson* v. *Reese, supra,* 598 F.2d 826-7. No malicious intent has even been asserted by plaintiff and since none of the defendants ever met him or participated in his treatment program. Plaintiff himself testified that he had not been harmed during his confinement at the Forensic Unit and the various attempts by staff at the Forensic Unit to treat him have already been outlined at pages 4-6, *supra.*

In light of the lack of any evidence that the defendants took action which they knew or should have known would violate plaintiff's rights or maliciously intended to injure him or violate his rights, they were clearly entitled to the good faith immunity as a matter of law. *Procunier* v. *Navarrette, supra,* 434 U.S. at 562-5; *Nelson* v. *Reese, supra,* 592 F.2d at 825-6. Such a conclusion is particularly appropriate in this case, where plaintiff's claims relate to a lack of fiscal and staff resources and not to any attempt by defendants to injure him or violate his rights. The district court acknowledged that this would be the proper result when, in response to defendants' motion for judgment notwithstanding the verdict, it reduced the damages award to "nominal damages of $1" and observed: "In integrating the facts and the law which governs the grant of monetary damages to aggrieved plaintiffs, there is no justification either with regard to lack of medical treatment or living conditions for choosing these or any other defendants to be liable for monetary damages" (Aa57). There is no basis in either the facts or law governing this case for the court of appeals to have vacated this ruling by the district court.

The court of appeals also found that the Eleventh Amendment did not bar retroactive monetary damages against defendants in this case. (Aa36). However, this Court has specifically held that this amendment bars a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury. *Edelman* v. *Jordan*, 415 U.S. 651, 662-3 (1974). It is also well-established that this immunity extends to individual state officials and agencies where the state is the real party in interest and the action is in essence one for the recovery of money from the state. *Id.* at 663. This principle of sovereign immunity was recently reaffirmed by this Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979), and the Third Circuit in *Skehan* v. *Bd. of Trustees of Bloomsburg State College*, 590 F.2d 470, 488-91 (3d Cir. 1978). There have been no allegations or proofs in this case that defendants acted outside their official capacites and in fact the record reflects repeated efforts by the defendants to obtain increased funding from the New Jersey Legislature for the Forensic Unit. (Aa42; Exh. D-5, III T61-4 to III T62-24). Thus, monetary damages against these State officials are clearly barred by the Eleventh Amendment in this case. *Alabama* v. *Pugh*, 438 U.S. 781 (1978), *Edelman* v. *Jordan, supra.*

Perhaps the most inexplicable and unsupportable portion of the court of appeals' decision in this case concerns the awarding of punitive damages. The district court vacated the jury's awarding of $10,000 punitive damages because there was "no evidence that defendants acted with 'impermissable motivation or . . . disregard' of plaintiff's constitutional rights to such an extent that they should be subjected to a judgment for punitive damages" and "an award of punitive damages is totally without evidentiary basis." (Aa53-54). Despite their admission that

"we nonetheless confess to uneasiness about imposing exemplary damages against these defendants based on the existing record" and their acknowledgement that the current record could not support a finding of punitive damages, the appellate court ordered a new trial on this issue because plaintiff was entitled to "a more meaning ful opportunity to prepare his case against Klein and the other individual defendants through interrogatories or depositions." (Aa42-44). In light of the fact that counsel for the plaintiff was appointed in November 1977 and the trial was not begun until May 1979, this reversal of the district court's clear finding that there was no evidentiary basis for a punitive damages award appears to simply offer plaintiff a second opportunity to obtain punitive damages

* * *

In sum, the court of appeals' decision in this case is in direct conflict with the opinions of this Court establishing a qualified good faith immunity for state administrative officials, and creates constitutional rights for the criminally insane which have no support in lower federal court decisions or the caselaw of this Court. If left unchanged, the decision in this case will have an extremely detrimental effect on the operation of public institutions for the mentally disabled and will make it virtually impossible for states to hire qualified professionals or to administer state programs for the mentally disabled. The court of appeals' misinterpretation of the established law governing these novel issues of extreme public policy significance and its failure to apply the appropriate legal standards to the facts of this case should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JAMES R. ZAZZALI,
Attorney General of New Jersey,
Attorney for Petitioners,
State House Annex,
Trenton, New Jersey 08625.
(609) 292-8231

ERMINIE L. CONLEY,
Assistant Attorney General,
Of Counsel.

STEVEN WALLACH,
Deputy Attorney General,
On the Petition.